85-382

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

DAVID HEGGY,

Petitioner,

vs.

CARL WELTY and SUSAN WELTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

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QUESTION PRESENTED

Whether petitioner's due process rights were violated because the state courts permitted entry of a default judgment based upon deficient notice, not reasonably calculated to apprise petitioner of the pendency of the action, denying petitioner the opportunity to be heard in his defense.

PARTIES

All parties to the proceeding petitioned from appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI
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David Heggy, your petitioner, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals for the State of Wisconsin entered April 18, 1985, review having been denied by the Supreme Court of the State of Wisconsin on July 11, 1985.

OPINIONS BELOW

The opinions of the Wisconsin Court of Appeals and the Wisconsin Circuit Court are reproduced in the Appendix hereto (beginning at A-1 and A-33, respectively. The Court of Appeals' decision has been recommended for publication and is scheduled to be reported in Vol. 123 of the Wisconsin Reports. The trial court decision is unreported. The Order of the Wisconsin Supreme Court denying review is reproduced in the Appendix at A-31.

JURISDICTION

The judgment of the Wisconsin Court of Appeals was entered on April 18, 1985. This judgment held that the trial court judgment of December 10, 1983, awarding plaintiff below $156,163.16 in

compensatory damages and $200,000.00 in punitive damages, and the trial court's order of April 6, 1984, denying petitioner's motion to set aside such judgment, were not void for want of personal jurisdiction.

Petitioner timely filed a petition for review in the Wisconsin Supreme Court. The court denied this petition on June 11, 1985.

This petition is being filed within ninety days of the denial of the petition for review by the Wisconsin Supreme Court. The jurisdiction of this Court is invoked under 28 USC §1257(3), because the petitioner claimed Constitutional due process rights which claim was denied by the Wisconsin courts. This federal question was raised as discussed at page 14, infra.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fourteenth Amendment, §1 --

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 801.11, Wis. Stats.

> 801.11. Personal jurisdiction, manner of serving summons for
>
> A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> (1) Natural person. Except as provided in sub. (2) upon a natural person:
>
> (a) By personally serving the summons

upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode within this state in the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof.

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the sumons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

(d) In any case, by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

STATEMENT OF THE CASE

This case draws into question the Constitutional adequacy of the service by publication in this case. Carl and Susan Welty filed a Summons and Complaint in Wisconsin Circuit Court on July 13, 1983, alleging that petitioner caused them property damage and severe emotional distress, and claiming $250,000.00 in compensatory damages and $250,000.00 in punitive damages. They made several attempts to serve defendant at his home at a time when he was away from home on an extended vacation (Transcript January 23, 1984, pp. 16-17, 35-39). They made no attempt to ascertain his whereabouts. Failing to effect personal service, they sought to accomplish service by publication and mailed notice under sec.

801.11, Stats. Four mailings were made, three of which were to variations of petitioner's home address, at a time when plaintiffs knew that petitioner did not receive mail at his nome (Transcript, January 23, 1984, p. 13; February 1, 1984, pp. 12,15; Plaintiff's Exhibit 84, p. 6). No mailing was made to petitioner's post office address. All of these mailings were returned to sender by the post office. Petitioner's post office address had not changed for over two years and easily could have been discovered by inquiry at town offices or by inquiring of other persons known by the Weltys to have this information (Transcript, January 23, 1984, pp. 13, 71; February 1, 1984, p. 26). The Weltys in fact had actual knowledge of this post office address prior to the default trial date. Instead of acting on this knowledge and attempting

to notice petitioner, the Weltys intentionally kept the trial date secret to avoid appearance by petitioner (Transcript, January 23, 1984, pp. 11-12; February 1, 1984, pp. 109-110, 113-114, 111-124).

Default judgment was rendered on December 10, 1983 and entered on December 12, 1983, in the amount of $356,000.00. On January 14, 1984, petitioner moved the court to set aside the judgment.

Petitioner filed notice of appeal from the default judgment on January 24, 1984. On April 6, 1984, the trial court denied petitioner's motion to set aside the judgment. Petitioner promptly filed notice of appeal from this order, and the two appeals were consolidated for hearing before the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals affirmed the trial court's denial of the

motion to set aside the judgment and affirmed the trial court's award of compensatory damages in the amount of $156,000.00. The Wisconsin Court of Appeals reversed the punitive damages award and remanded for a new trial on that issue.

Petitioner timely filed for review by the Wisconsin Supreme Court. Such review was denied by order of the court entered June 11, 1985. This petition followed that denial.

RAISING THE FEDERAL QUESTION BELOW

On his appeal from the default judgment, petitioner had no opportunity to raise any issues at the trial court level. In his motion to set aside the verdict, petitioner strenuously asserted the lack of personal jurisdiction, arguing that plaintiffs had not exercised due diligence to obtain personal service or service by mailing before resorting to service by publication. Plaintiffs' brief to the trial court discussed principles of constitutional due process at some length (see A-95). In addition, the trial court expressly considered due process requirements at the hearing on the motion to vacate the judgment (Transcript, February 1, 1984, pp. 185-197, A-90). Thus, the constitutional issues clearly were raised below and decided by the trial court. On direct appeal to the Wisconsin

Court of Appeals from the default judgment, the petitioner clearly and plainly raised the Constitutional issue (Brief and Appendix of Defendant-Appellant). Because he therefore had not waived this right, the issue was properly before the Court of Appeals.

The Court of Appeals' stated refusal to address petitioner's Constitutional claim below for failure to raise the issue in the trial court cannot deprive this Court of the right to review herein. First, the trial court and the Court of Appeals both actually decided the Constitutional issue. Secondly, the state procedural rule used to evade review of the Constitutional issue is not a rule strictly or regularly followed. Barr v. City of Columbia, 84 S.Ct. 1734, 1736, 378 U.S. 146, 12 L.Ed.2d 766 (1964).

The Court of Appeals conceded that it has the discretion to address the Constitutional issue where the issue has had full factual development, where both parties have had opportunity to brief the issue, and where it is in the interest of justice to do so (Opinion, p. 10, A-17). The appeals court could not deny that there was full factual development and that the issue was briefed by both parties. The court based its exercise of discretion solely on the following ground (Opinion, p. 10, A-18):

> Defendant's constitutional attack is essentially an attack on plaintiffs' reasonable diligence which we have already resolved in plaintiffs' favor insofar as sec. 801.11(1), Stats., requires it.
>
> Defendant was found to have actual notice of the action and to have purposely avoided service.

The court gives no other reasons for its refusal to address the Constitutional

issues. It is plain that these reasons constitute the court's opinion , on the merits of the case, that due process was satisfied. The Court of Appeals thus, in fact, decided the Constitutional issue now before this Court, and therefore this Court has jurisdiction. Orr v. Orr, 99 S.Ct. 1102, 1110, 44 U.S. 268, 276-277, 59 L.Ed.2d 306 (1979).

In other decisions by the Wisconsin courts, Constitutional issues raised for the first time on appeal have been considered routinely whenever there is full factual development and both parties have briefed the issue. In Stierle v. Rohmeyer, 218 Wis. 149, 260 N.W. 647, 654 (1935), the Wisconsin Supreme Court held that a due process claim not raised at trial should be considered on appeal:

It is also argued that as the

> unconstitutionality of the provisions was not raised in the court below, it will not be considered here. This is a general rule, but it is sometimes "more honored in the breach than in the observance." [Citations omitted.] When the point is one of law, not at all dependent on facts that might have been presented below had the point been there raised, no compelling reason is perceived why it may not be considered on review, and no reason is perceived why the constitutionality of the provision here involved should not be now considered and decided. The point has been fully and very ably briefed by counsel on both sides by direction of the court, and nothing more could possibly have been presented below than has been presented here.

As these cases demonstrate, review by the Wisconsin appellate courts is almost automatic whenever, as here, there is full factual development and both parties have briefed the issues. Accord, State v. Popanz, 112 Wis.2d 166, 332 N.W.2d 750, 753 n. 1 (1983); In the Interest of Baby Girl K, 113 Wis.2d 429, 335 N.W.2d 846 (1983), app. dismissed, Buhoe v. Krueger, 104 S.Ct. 1262; Binder v. City of Madison,

72 Wis.2d 613, 241 N.W.2d 613, 617 (1976). Cases denying review generally have involved lack of sufficient factual development. State v. Yellow Freight System, Inc., 101 Wis.2d 142, 303 N.W.2d 834, 842 (1981); Laufenberg v. Cosmetology Examining Board, 87 Wis.2d 175, 274 N.W.2d 618, 624 (1979).

Additionally, it should be noted that the Wisconsin procedural rule rests on a presumption of waiver which cannot apply to this case. The analysis of the above cases cannot even be reached in the absence of such waiver. In State v. Wiedner, 47 Wis.2d 321, 325-326, 177 N.W.2d 69 (1970), the court held:

> With respect to a claim of constitutional right (as opposed to questioning the constitutionality of a statute) this court has stated that failure to raise such an issue in the trial court may result in the question being deemed waived....

The Wiedner court, despite finding such waiver, went on to decide the constitutional issue because there were no factual issues in need of resolution.

This case involves two appeals consolidated before the Court of Appeals. The first of those appeals was a direct appeal from the default judgment. As to that appeal, the petitioner made no appearance in the trial court. Because he thus had no opportunity at all to present any arguments, Constitutional or otherwise, he hardly can be deemed to have waived any arguments. Regardless of the subsequent order denying petitioner's motion to set aside the judgment, the petitioner had a right to raise any issues regarding personal jurisdiction which directly challenge the judgment on appeal. Heaston v. Auston, 47 Wis.2d 67, 176 N.W.2d 309 (1978). He cannot be

foreclosed from raising Constitutional arguments on this direct challenge, because he never waived the right to raise those arguments. Kohler Co. v. I.H.L.R., 81 11, 25, 9 N.W.2d 695 (1977).

Because Wisconsin has no procedural rule of strict application justifying its refusal to specifically address petitioner's Constitutional claims, this Court has the right to review those claims. Barr v. City of Columbia, 84 S.Ct. 1734, 1736, 378 U.S. 146, 12 L.Ed.2d 766 (1964). Furthermore, the matter is fully developed for this Court. The factual matters underlying the claim are fully set out in the record. Both parties briefed the Constitutional issues below and will do so again on this review. The Wisconsin Court of Appeals in fact decided the merits of the

Constitutional issue. There can be no doubt that the issue is properly before this Court.

REASONS FOR GRANTING THE WRIT

I. This case presents a substantial issue of federal law.

Petitioner is subject to a $156,000.00 default judgment entered without notice or opportunity to be heard. This is a substantial deprivation of his rights under the United States Constitution. This Court always has considered the entry of judgment without personal jurisdiction to be a serious and substantial violation of the due process clause of the Fourteenth Amendment. In Kulko v. Superior Court, 98 S.Ct. 1690, 1696, 436 U.S. 86, 91, ____ L.Ed.2d ____ (1978), this Court stated:

> It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. Pennoyer v. Neff, 95 U.S. 714, 732-733, 24 L.Ed. 565, 572 (1878); International Shoe Co. v. Washington, 326 U.S., at 316, 66 S.Ct., at 158. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-314, 70 S.Ct. 652-657, 94 L.Ed. 865 (1950)....

The record below clearly indicates that the notices were mailed to addresses which plaintiffs knew were not petitioner's post office address. Plaintiffs had actual knowledge of petitioner's post office address prior to the default hearing and thereafter failed to call this to the court's attention and failed to attempt to direct any notice to that address, expressly attempting to keep the date of the hearing secret so that petitioner would not find out about the

hearing and appear. Under Wisconsin law, if they had revealed this information to the trial, the court would have an obligation to inquire further. Hansher v. Kaishian, 79 Wis.2d 374, 255 N.W.2d 564 (1977).

The notice in question was not reasonably calculated to give petitioner notice of the hearing, but instead was expressly calculated to avoid such notice. There can be no question that this is a denial of due process. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), this Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to defend [citation omitted]***

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

The attempts at mailed notice in this case were mere gestures, not sincere attempts to accomplish service. This Court in Mullane held that due process required the trustee to mail notice to the post office addresses of all beneficiaries whose whereabouts could be ascertained with due diligence. 70 S.Ct. at 659, 339 US at 317. In the case of a trust with a large number of beneficiaries, the court found that "notice reasonably certain to reach most of those interested is likely to safeguard the interests of all." 70 S.Ct. at 659, 339 U.S. at 319. Where, as here, the plaintiffs had only one party to notify, due diligence clearly requires reasonable inquiry to discover

petitioner's post office address. Certainly due diligence requires more than disregard of actual knowledge of that address.

Petitioner's post office address could have been obtained easily if plaintiffs had been seriously desirous of delivering notice to petitioner. They made no attempt to contact various persons, such as petitioner's caretaker or attorney, either to determine his whereabouts or post office address. They failed to check town records. They did not contact a bank which was the trustee of a trust fund established for petitioner, and plaintiffs' attorney admittedly decided not to contact the bank officers because he did not want to make them aware of the lawsuit (Transcript, December 9, 1983, p. 67). Their attorney advised plaintiffs not to discuss the case

because they were afraid petitioner would learn about it (Transcript, February 1, 1984, p. 113). They made three useless mailings to the residence despite their knowledge that mail was not received at the residence. Plaintiffs' attempts at notice were knowingly calculated not to inform petitioner of the proceeding and thus fail to satisfy due process.

II. The court below decided a novel federal question in a way which conflicts with Supreme Court precedent.

In determining that plaintiffs had exercised reasonable diligence in attempting personal service and service by mail, both the trial court and the Wisconsin Court of Appeals relied upon after-the-fact evidence tending to show that petitioner actually would not have received the summons even if plaintiffs had pursued sources of information available to them. Thus, these courts took the position that steps otherwise necessary to satisfy the reasonable diligence test required by principles of due process may be excused by subsequent proof that such steps would have been unsuccessful anyway. In short, the courts below concluded that reasonable diligence

need not be utilized if plaintiffs subsequently can prove that such diligence would have been unsuccessful. Such an interpretation of the requirements of due process is novel and never has been suggested by the decisions of this Court.

This Court consistently has held that compliance with the notice and hearing requirements of due process is a precondition to a valid proceeding adversely affecting the liberty or property rights of a party. E.g., Mennonite Board of Missions v. Adams, 103 S.Ct. 2706, 2709-2712 (1983). Service by publication may be utilized only after reasonable diligence is exercised to attempt a superior form of service, and only after those attempts have proved unsuccessful. Actual knowledge is not a substitute for the failure to comply with due process notice requirements. Given

these well settled principles, the state courts' position is untenable.

Before relying on publication to supply personal jurisdiction, due process requires that a plaintiff employ means "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Hanover Trust Co., 339 U.S. 306, 315 (1950). This rule necessarily requires that the determination of whether such steps have been taken be based upon the state of facts known to the plaintiffs when they attempted service. It is the conduct of the plaintiffs and the extent of the steps taken at that time which control. Due process cannot be satisfied by an after-the-fact determination that the notice required by due diligence might not have reached the defendant. The ruling below is, therefore, in conflict

with Supreme Court precedent requiring the exercise of reasonable diligence.

III. <u>This case involves important questions of law which should be settled by this Court.</u>

The general standard applicable to the due process issue is well settled. That is, a plaintiff must use reasonable diligence in attempting to serve a defendant with notice of a lawsuit before resorting to constructive notice. However, the paucity of case law defining in more practical detail what constitutes reasonable diligence requires further clarification from this Court. For example, the present case poses the question of the extent to which a plaintiff must attempt to ascertain a defendant's whereabouts when he cannot be

located at his home. Plaintiffs contended that their attempts to serve defendant at his home were sufficient; they made no attempts to inquire of available sources as to petitioner's actual whereabouts. The case also poses the question of the extent to which local offices and other sources must be checked to determine a post office address. Petitioner's post office address could have been obtained from local utility companies, local tax records, and from his driver's license and automobile registrations, as well as from petitioner's attorney, caretaker, and insurance agent. Plaintiffs made no attempt to check such sources.

There is very little reported case law elaborating upon the standard of reasonable diligence set forth by this Court. Future plaintiffs attempting service of process and courts deciding

whether to permit service by publication would be aided greatly by a decision of this Court elaborating upon the general standard. The requirements of due process in this context are of great importance in the administration of justice, and the issue arises with frequency. The present case illustrates the manner in which the general standard can be misinterpreted. This Court should take the opportunity to elaborate upon the applicable principles.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of Wisconsin in Welty v. Heggy. In the event that the Petition is granted, Petitioner prays that the judgment of the court below be reversed and that the cause be remanded to the Circuit Court for trial.

Respectfully submitted,

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Dated: Sept. 3, 1985